

DA's Offices Should Adopt Internal Policy Against Prosecuting Prostitutes; Instead Focusing On Prosecuting Sex Traffickers And Recognizing Prostitutes As Victims

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I. INTRODUCTION

Although prostitution is illegal in forty-nine of the fifty United States, sex can be purchased with ease in communities throughout the country. Traditionally, the law enforcement and prosecutorial approach to prostitution has focused on the arrest and prosecution of the prostitute, overlooking the role that pimps play in orchestrating the criminal behavior. This is puzzling, given the fact that the pimp is the individual asserting control over the prostitute, orchestrating the illegal sex acts, and collecting the earnings. Plainly put, a pimp is a human trafficker and should be prosecuted as such.

Only recently has there been a paradigm shift in some communities toward a focus on apprehending and charging pimps. This shift appears to correlate with the growing acceptance that, oftentimes, prostitutes are the victims of sex trafficking. Though the efforts in furthering this shift must be collaborative; District Attorneys' offices should be leaders in the movement, given their charging power and influence. District Attorney's offices should spearhead adoption of internal policies against prosecuting prostitutes (at a minimum, underage prostitutes), instead focusing on providing social services to prostitutes and prosecuting pimps. Additionally, District Attorney's offices should support the implementation of human trafficking courts and work collaboratively with other criminal justice officials (judges, defense attorneys, and police) to address prostitution and sex trafficking. This is ideal for two reasons: 1) this shift will more

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effectively reduce the prevalence of prostitution; and, 2) the approach appropriately identifies prostitution as sex trafficking and, as such, recognizes the victimization of prostitutes.²

Human sex trafficking is defined as the “induce[ment] by force, fraud, or coercion to . . . perform a sex act for money or anything of value.”³ The sex trafficking of a minor does not require force, fraud, or manipulation however.⁴ Human sex trafficking of a minor requires only that the sex trafficker induce a minor to perform sex acts in exchange for money of something of value.⁵ But traditional notions held in society about prostitutes do not recognize this reality. Prostitutes are often seen as unsympathetic victims, or not as victims at all. Prostitutes are in the unique position of participating in an illegal act, while, more often than not, being coerced, manipulated, or forced into doing so. It is unfair and immoral to punish these women.

Proponents for the continued prosecution of prostitutes often assert that a number of sex workers are not induced to do so by a third party. These arguments tend to assert that these women have exercised their free will by engaging in prostitution. While it is true that this does exist, these individuals tend to be privileged by class, race, or education, and generally have options for escape. Moreover, these individuals are in the extreme minority—studies have shown that close to 90% of prostitutes have pimps.⁶ Furthermore, many prostitutes are hesitant to reveal their pimps to authorities as a result of psychological coercion and a desire to protect themselves and their loved ones from harm. If the criminal justice system forces prostitutes to

² This paper focuses on the experience of the female prostitute, but in no way assumes that male prostitutes do not encounter abuses as sex workers. The female focus is largely related to the fact that the research on this subject is predominantly female focused.

³ U.S. Customs and Border Protection. Official website of the Department of Homeland Security, <http://www.cbp.gov/border-security/human-trafficking> (last visited October 15, 2014 at 10:30pm).

⁴ *Id.*

⁵ *Id.*

⁶ Evelina Giobbe, WHISPER Oral History Project (1987), <http://www.rapeis.org/activism/prostitution/prostitutionfacts.html>.

reveal their pimps, and only provides services following the turning over of this information, prostitutes will continue to be placed at great risk of harm.

In her 2010 article, *The Real Harms of Prostitution*, psychiatrist, researcher, and sex-trafficking expert, Melissa Farley explains that, “[f]or the most part, prostitution is not a freely made choice because the conditions that would permit genuine choice are not present: physical safety; equal power with buyers; real alternatives.”⁷ Regardless of whether the sex act is committed voluntarily, all prostitutes are ostensibly subject to similar, if not the same, harms and dangers.

By implementing a shift in how courts and law enforcement address prostitution, outlined above, the greater good will be served, particularly because a great number of women will be given the opportunity to escape the oppression and abuse that defines sex work. The fact that there may be a small number of sex workers that are not influenced by pimps does not outweigh the interest in coming to the aid of the vast majority of prostitutes whom are under the control of pimps.

The majority of prostitutes enter into prostitution as minors, often as runaways or abandoned youths between ages 12 and 14. These young people are generally more susceptible to pimp manipulation because they are seeking attention and support. Pimps prey on these needs and start the grooming process, generally taking the targets of their coercion out on “dates” and giving the impression that they are cultivating a romantic relationship. A number of studies have also noted high levels of drug use among prostitutes, high rates of childhood abuse,⁸ high levels

⁷ Melissa Farley, *The Real Harms of Prostitution: Why would we want to legalize what women who have experienced it call ‘paid rape’ and voluntary slavery?*, MERCATORNET (April 12, 2014 12:00 PM), http://www.mercatornet.com/articles/view/the_real_harms_of_prostitution.

⁸ Melissa Farley, Isin Baral, Merab Kiremire, Ufuk Sezgin, *Prostitution in Five Countries: Violence and Posttraumatic Stress Disorder*, FEMINISM & PSYCHOLOGY VOLUME 8 (4): 405-426 (1998), available at http://www.academia.edu/2567561/Prostitution_in_Five_Countries_Violence_and_Post-Traumatic_Stress_Disorder.

of psychosocial issues, truancy, extreme rates of on-the-job victimization, and the highest known homicide rate of any studied group of women.⁹ Approximately 80% of female prostitutes have been raped and report that they experience 8-16 rapes per year while in prostitution, either by their pimps or the men purchasing sex acts.¹⁰ Despite these staggering statistics, prostitutes are treated by law enforcement and prosecutors as criminals, not victims. This needs to change.

II. MINORS INVOLVED IN PROSTITUTION

While the prosecution of adult women for prostitution is misguided and ineffective, the prosecution of minors for prostitution is inappropriate. This is highlighted by the fact that a number of jurisdictions charge minors with prostitution who have not yet reached the age of consent identified by the governing law. It is manifestly unfair and illogical that a minor can be charged for a crime arising out of an act for which *they are not legally able to consent to*. And, yet, it happens all the time.

A minor engaging in prostitution is being abused. Whether she recognizes it or not, the law must, and society should. In the United States, we have collectively embraced the notion that child molestation and rape is criminal behavior. Just as we do not prosecute a child for being the victim of traditional child abuse, we should not prosecute minors for being the victims of sex trafficking. However, a number of jurisdictions still prosecute minors for prostitution, at times charging them as adults. One report stated that, as of 2010, approximately 200,000 minors involved in prostitution had been prosecuted, sentenced, or incarcerated as adults.¹¹ These

⁹ Marilyn C. Moses, *Understanding and Applying Research on Prostitution*, THE NATIONAL INSTITUTE OF JUSTICE (April 2, 2014 6:00 PM), http://www.nij.gov/journals/255/pages/prostitution_research.aspx.

¹⁰ Prostitution Information Page, RAPEIS, (March 15, 2015 10:07 PM), <http://rapeis.org/activism/prostitution/prostitution.html>.

¹¹ Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 LA LAW REVIEW 99: 107-108 (2010).

charging practices are not in accordance with other comparable prosecutorial policies regarding minors or with common sense and decency.

Fortunately, with their charging power, District Attorneys' offices can eradicate this concern. In fact, in its 2013 Midyear Meeting, the American Bar Association passed a number of resolutions addressing the treatment and charging of both minors and adults victims of sex trafficking.¹² These resolutions encourage lawmakers to implement laws that address the issue of sex trafficking.¹³ Additionally, these resolutions call for training judges, prosecutors, and defense attorneys, to more effectively identify victims of human trafficking.

III. A MORE EFFECTIVE APPROACH

According to the Texas District and County Attorneys Association ("TDCAA"), traditional treatment-arrest and prosecution of sex workers does not work, particularly when focused at prostituted minors. As a remedy, the TDCAA suggests individualized attention and special services. TDCAA suggests that this focus on wraparound services for minor prostitutes is necessary because close to one-third of runaway minors use sex to trade for food, drugs, money, and lodging. The Dallas County District Attorney's Office (DCDA) is devoted to prosecuting those who exploit prostitutes and works in collaboration with local police to identify pimps and focuses on prosecuting them instead.

In 2010, the Anaheim, California Police Department (vice detail) began identifying commonalities among the women whom they arrested for prostitution and, as a result, began implementing an "innovative approach to addressing the problem [of sex trafficking

¹² American Bar Association, Midyear Resolutions 104F-104I (2013), available at, http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2013_hod_midyear_meeting_daily_journal.authcheckdam.pdf.

¹³ For example, the implementation of a law that would allow for a survivor of sex trafficking to assert an affirmative defense of sex trafficking if charged with prostitution.

prostitution].”¹⁴ The focus of this program is to: assist women in escaping prostitution; help them realize their situations and the circumstances that got them there; provide services to assist with redirecting their lives in a positive direction; and, seek cooperation in pursuing the pimps who trafficked them as prostitutes.¹⁵

In the Anaheim criminal justice system, there is a commonly-held belief that, “arresting the pimp results in a bigger impact on deterring prostitution activity.”¹⁶ This is true because, generally, women convicted of prostitution are back on the streets in a short amount of time. Alternatively, when prostitutes are incarcerated for longer terms the pimps simply indoctrinate new girls and women to fill the vacancy. By charging and incarcerating pimps, the problem is better solved because the sentences are longer. Although this shift in approach was initiated by the Anaheim Police Department—and was “initially a surprise to the Orange County District Attorneys Office”—the approach is now enthusiastically followed and has been successful at trial.¹⁷ Using Anaheim’s approach, District Attorneys offices across the country have the opportunity to implement similar programs and policies. Since its inception in August of 2011, 38 Anaheim pimps have been arrested and charged.¹⁸ Of these arrestees, all have either been convicted or are awaiting trial.¹⁹ Anaheim reports further that, in this time, 54 prostitutes were initially removed from the sex trafficking industry, and only 4 have returned.²⁰ Using Anaheim’s approach, District Attorney’s offices across the country have the opportunity to achieve similar results.

¹⁴ Steve Marcin, *Prostitution and Human Trafficking: A Paradigm Shift*, FBI LAW ENFORCEMENT BULLETIN (April 15, 2014 7:00 PM), <http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/2013/March/prostitution-and-human-trafficking>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* Prior to this shift in focus, there had only been three pimping/pandering arrests in the community from 2008 through 2011.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

The State of New York has recently implemented a policy similar to what has been successful in Anaheim. The Human Trafficking Intervention Courts is the first statewide system of its kind, addressing human trafficking and prostitution in a forum similar to that of Domestic Violence Courts or Low-level Drug Courts. These courts handle prostitution charges after arraignment and focus on providing services rather than incarceration. In these courts, specially trained prosecutors work with judges and defense attorneys to come up with the most ideal case plan with the stated goal of providing services to victims of human and sex trafficking. In collaboration, the attorneys and the judge refer prostitutes to social services as opposed to sentencing them to jail time. The social services provided vary from case to case, but focus on drug treatment, shelter, immigration assistance, healthcare, education, and job training. A New York Times article discussing the program quoted New York Chief Judge Jonathan Lippman stating:

[t]he initiative comes as a time of growing consensus among criminal justice professionals across the country that in many cases it makes more sense to treat people charged with prostitution offenses as victims rather than defendants. It is a view that is largely born of an increasing focus on the widespread trafficking of under-age girls; women typically enter prostitution in the United States between 12 and 14.²¹

This approach has been supported by a number of District Attorneys offices throughout the State of New York and throughout the country. Specialized Human Trafficking Courts have been implemented in cities such as, Baltimore, Columbus, Phoenix, and West Palm Beach.²² Similarly, several Texas counties have implemented local laws that require offering prostitution

²¹ William Rahbaum, *With Special Courts, State Aims to Steer Women Away from the Sex Trade*, NEW YORK TIMES (March 30, 2014 8:00 PM), http://www.nytimes.com/2013/09/26/nyregion/special-courts-for-human-trafficking-and-prostitution-cases-are-planned-in-new-york.html?smid=pl-share&_r=0.

²² *Id.*

diversion programs.²³ Additionally, Connecticut has two courts that specifically address “quality of life” offenses, including prostitution.²⁴

IV. CONCLUSION

Although it is true that a District Attorney’s office cannot unilaterally create a new court system, they can support the transition that is making waves across the country. District Attorney’s have considerable power—the utmost—when determining whom to prosecute and what to prosecute for. District Attorney’s offices can and should use their power to support the movement toward decriminalization of prostitutes. Whether motivated by the belief that prostitutes are victims, rather than perpetrators, or the understanding that the traditional approach to prostitution is ineffective, a focus on support services and pimp prosecution is the ideal approach to prostitution and sex trafficking and should be supported in any and all ways by District Attorney’s offices across the country.

²³ *Id.*

²⁴ *Id.*